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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

CHARLES JOSEPH O'BRIEN and
THOMAS PARISI,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Charles Joseph O'Brien and Thomas Parisi pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this cause on August 30, 1966.

OPINIONS BELOW

The opinion of the District Court is reported at 255 F. Supp. 755 and appears in the record at pp. 271a-320a.[1] The

[1] Petitioners have filed 9 additional copies of the record (appendix) printed for consideration of the Court of Appeals in which the opinions of the district judge are reproduced in full (Rule 23 (1) (i)). All references followed by "a" are to the appellants' joint appendix filed in the Court of Appeals.

opinion of the Court of Appeals is reported at 365 F.2d 601, and is printed as Appendix A, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered August 20, 1966 (Appendix B, *infra*). A timely petition for rehearing was denied on October 6, 1966 (Appendix C, *infra*). On October 20, Mr. Justice Potter Stewart extended the time within which to petition for a writ of certiorari to December 5, 1966. Jurisdiction is conferred on this Court by 28 USC §1254.

QUESTIONS PRESENTED

1. Is an indictment under 18 U.S.C. §549, which charged defendants with having unlawfully removed merchandise from a bonded warehouse fatally deficient if it does not allege the existence of a felonious intent on the defendants' part?

2. Where a statute punishes certain acts when done unlawfully, but does not specify when such acts become unlawful, is it sufficient for an indictment thereunder merely to allege that the defendants did such acts unlawfully without setting forth the basis for the claim of unlawfulness?

3. Is a defendant deprived of his constitutional right to a trial by jury when the Court instructs the jury that an essential element of the offense has been proved?

4. In a criminal case where the accused has not testified, is it a violation of his constitutional rights for the prosecutor to argue to the jury that testimony which only the accused could contradict stands uncontradicted?

5. Is it an essential element of the crime punishable by 18 U.S.C. §549, of unlawfully removing merchandise from a bonded warehouse and Customs custody and control, that there be knowledge on the defendants' part that the merchandise involved was in a bonded warehouse or otherwise in Customs custody or control?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitution—Amendment V provides in pertinent part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; . . ."

2. Constitution—Amendment VI provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to be informed of the nature and cause of the accusation . . ."

3. Section 549, Title 18, U.S.C. provides in pertinent part:

> ". . . Whoever . . . unlawfully removes any merchandise or baggage in such vessel, vehicle, or bonded warehouse or otherwise in customs custody or control; . . .
>
> "Shall be fined not more than $5,000 or imprisoned not more than two years, or both."

4. Section 3481, Title 18, U.S.C. provides in pertinent part:

> "In trial of all persons charged with the commission of offenses against the United States . . . the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him."

5. Section 1484(j), Title 19, U.S.C. provides in pertinent part:

> "(j) Merchandise shall be released from customs custody only to or upon the order of the carrier . . ., except that merchandise in a bonded warehouse shall be released from customs custody only to or upon the order of the proprietor of the warehouse . . .".

6. Section 1555, Title 19, U.S.C. provides in pertinent part:

> "Buildings or parts of buildings and other inclosures may be designated by the Secretary of the Treasury as bonded warehouses for the storage of imported merchandise entered for warehousing, or taken possession of by the collector, or under seizure, or for the manufacture of merchandise in bond, or for the re-packing, sorting or cleaning of imported merchandise . . . Except as otherwise provided in this chapter, bonded warehouses shall be used solely for the storage of imported merchandise and shall be placed in charge of a proper officer of the customs, who, together with the proprietor thereof, shall have joint custody of all merchandise stored in the warehouse; . . ."

STATEMENT OF THE CASE

The Steamship Montrose sank in the Detroit River in July, 1962 (339a). In the course of salvage operations, some merchandise was removed and placed at the Detroit Harbor Terminal. In March, 1963, Parisi and a co-defendant, Finazzo,[4] removed a statue of St. Theresa, some brass valves, and marble slabs from the Detroit Harbor Terminal and took them to Parisi's warehouse.

Two or three days later, customs agents arrested Parisi at his warehouse (58a-66a). Parisi admitted removing the articles from the Terminal. He said it was done at the request of Finazzo and that Finazzo could explain the whole thing (67a). He was permitted to make a telephone call and within half an hour, Finazzo, accompanied by petitioner O'Brien, came to Parisi's warehouse (71a, 72a). They both were placed under arrest.

The Indictment

O'Brien, Finazzo and Parisi were indicted under 18 USC §549 in three counts for removal of the statue of St. Theresa, the marble slabs, and the brass valves. The three counts, in similar language, charged essentially that they "did unlawfully remove certain merchandise from a bonded area • • • and from custody and control of the United States Custom Service" (5a, 6a).

At commencement of trial, the defendants moved to dismiss the indictment for failure to state an offense (15a-21a). The motion was denied (175a-177a). The challenge to the indictment was renewed by motions in arrest of judg-

[4] Finazzo was acquitted by the Court on motion for judgment of acquittal (181a).

ment (259a-260a). They were denied by a written opinion (311a-320a).

The Instruction to the Jury on Area B

The Detroit Harbor Terminal operates both a general warehouse and a bonded warehouse for the storage of imported merchandise pending customs' clearance (43a, 342a). It consists of two large buildings and two large open areas known as Area A and Area B (92a-95a). In its application for licensing as a bonded warehouseman, the Terminal had designated portions of the buildings and Area B as bonded warehouses (45a-46a, G. Ex. 27, 27a, 27b). The application stated Area B was to be used for export and import cargo (92a).

The goods involved in this case were all placed in Area B where they remained until removed by the defendants Finazzo and Parisi (41a, 362a). At trial, defendants argued that Area B was not and could not be a bonded warehouse because it was not an inclosure as required by law[3] (255a), being fenced on only two sides (94a, 95a); because it was used for storage of both bonded and unbonded merchandise (95a, 356a-358a); and because of defects in the application for bonding the area (97a-99a).

The Court instructed the jury that as a matter of law, Area B was a bonded warehouse (203a, 206a-209a, 221a). Defendants duly excepted to this instruction (235a).

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[3] 19 U.S.C. §1555

"Buildings or parts of buildings and *other inclosures* may be designated by the Secretary of Treasury as bonded warehouses * * *" (Emphasis added.)

The Prosecutor's Closing Argument

O'Brien was the business agent for the union representing the employees of the Detroit Harbor Terminal (120a). When arrested, he told the customs agents that 5 or 6 months before, William Young, the owner of Detroit Harbor Terminal, had asked him if he would arrange to have someone remove some scrap from the Terminal. Two or three months later, he said, remembering his conversation with Young, he asked Finazzo if he would be interested in removing some scrap (70a, 73a, 131a).

The government called Young as a witness (118a). He testified that although he never gave O'Brien or anyone else permission to remove the salvage merchandise in question, he could have talked to O'Brien about removal of some scrap (120a, 121a).

The government elicited from Young that he had not talked to O'Brien about the matter since O'Brien's arrest (121a, 122a). This testimony was the basis for the following argument in the government's rebuttal summation:

> "[I]s it believable to you that Mr. O'Brien is going to sit around for a year and a half, up to the very day of this trial, and in fact, up to the date of Mr. Young taking the stand and not go to Mr. Young and not ask Mr. Young?
>
> "'Look, Mr. Young, I am in trouble here. Didn't you tell me several months before this merchandise was released that you had given me permission to negotiate for the scrap removal?'
>
> "Is it believable to you that the defendant O'Brien is not going to talk to Mr. Young over this entire eighteen months period, or whatever it is, getting on close to two years now, between the time of this occurrence and the time of this trial, and yet, Mr. Young testifies, 'No, O'Brien never has talked to me since about this subject.' And there is no contradiction of that at all in this record." (211a)

O'Brien moved for a mistrial urging that the argument, particularly the last sentence, was a comment on his failure to testify, he being the only one who could contradict Young's testimony on this point (212a-214a). The motion was denied (284a-288a, 366a).

Defendants' Request for Instructions on Knowledge

There were no custom tags on the merchandise here involved (42a). It was all in a pile out in the open covered with snow and exposed to freezing conditions (352a, 353a). Other merchandise which was not as badly damaged was placed in the enclosed warehouse building (353a).

The prosecutor conceded that there was nothing "to indicate to a stranger that these goods were in the custody of the Customs at the time they were allegedly removed" (173a).

Petitioners requested the Court to instruct the jury that if the defendants did not know the merchandise was in a bonded warehouse or otherwise in customs custody, they should be acquitted (254a). The requested instruction was refused and exception taken (235a).

Parisi was convicted on two of three counts. O'Brien was convicted on all three counts (246a, 247a). Motions for new trial were filed (259a, 261a-264a) and denied (271a-309a).

REASONS FOR GRANTING THE WRIT

I.

THE INDICTMENT WAS FATALLY INSUFFICIENT IN THAT IT DID NOT CONTAIN THE ESSENTIAL ELEMENTS OF THE OFFENSE.

The decision of the Court of Appeals holds that the use in the indictment of the word "unlawfully" in the phrase "unlawfully removed" charges the felonious intent requisite for violation of 18 U.S.C. §549. This conflicts with the decision of the First Circuit Court of Appeals in *Hughes v. United States*, (1964) 338 F(2) 651, which the Court of Appeals here expressly refused to follow:

> "[Hughes] is analogous to the case at bar but the district judge did not follow it and neither do we." (Appendix A, *infra*, p. 23)

Hughes concerned precisely the same charging language under precisely the same sub-paragraph of 18 U.S.C. §549. It held the indictment invalid precisely because "unlawfully" does not charge the requisite felonious intent. On this point, the *Hughes* case followed the doctrine of *United States v. Carll*, 105 U.S. 611. The *Carll* case, ignored by the Court below, holds that an essential element of an offense (guilty knowledge in *Carll*, felonious intent here) not set forth in the statute must be set forth in the indictment "without any uncertainty or ambiguity."

The square conflict between the First and Sixth Circuits on the fundamental issue here presented requires resolution by this Court.

II.

PETITIONERS' RIGHTS UNDER THE SIXTH AMENDMENT TO BE INFORMED OF THE NATURE OF THE ACCUSATION AGAINST THEM WERE VIOLATED BY THE FAILURE OF THE INDICTMENT TO INFORM THEM IN WHAT RESPECTS THEIR ACTS WERE UNLAWFUL.

Indictments drawn under penalty statutes—those that provide punishment for doing an act unlawfully while leaving to other statutes or regulations the definition of unlawfulness—require some allegation to show why the act is unlawful, usually a reference to the other statute or regulation. Without such an allegation, the defendant will not be afforded his Sixth Amendment right to know "the nature and cause of the accusation." *Keck v. United States*, 172 U.S. 434.

Circuits other than the Sixth recognize this requirement as essential to the defendants' right to know the issues he will face at trial.

Thus, in the Ninth Circuit, an indictment for importing marchandise "contrary to law" which does not mention the law which the importation violated was held not to allege an offense. *Steiner v. United States* (1956), 229 F(2) 745.

A like rule prevails in the Fifth Circuit, *Babb v. United States* (1955), 218 F(2) 538. To the Fifth Circuit it makes no difference whether the penalty statute involves acts performed "contrary to law" or acts performed "unlawfully." *Sutton v. United States* (1946), 157 F(2) 661, which voided an indictment for "unlawful" possession of rationed sugar because "the unlawfulness was not shown in the indictment."

The indictment which petitioners faced told them only that they were charged with an unlawful removal. It no

more advised them of the issues they would meet at trial than would an indictment under 26 U.S.C. §7201 charging tax evasion but not stating the tax statute claimed to be evaded.

The record in this case discloses the unenviable position in which petitioners were placed.[4] The Government argued to the jury that the defendants were thieves and had committed a larceny (365a). The Court did not submit the theft issue to the jury but instead read to the jury from 19 U.S.C., §1484(j) (221a, 222a), which sets certain conditions for the release of merchandise from customs' custody. This statute was first brought to petitioner's attention during their trial. To this day, petitioners (and their counsel) do not know whether the jury based its verdict upon the government's argument or the court's instruction.

The Districts Court's opinion, adopted by the Court of Appeals (App. A, *infra*, p. 25), attempted to distinguish the Fifth and Ninth Circuit cases and *Keck v. United States*,

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[4] Petitioners' quandry was underscored at the commencement of trial.

> "Mr. Gillis: . . . Now, what is the unlawfulness of the act of the defendants in removing this merchandise? They do not tell us. There are at least five provisions in Title 19 of the Code of Federal Regulations which permit removal of goods from the custody of the customs under proper circumstances—upon payment of duty; upon putting up a bond; upon a showing that the goods have been damaged as a result of shipwreck, under certain circumstances they can be removed from the custody of the customs lawfully upon obtaining of certain permits.
>
> "Now, what permit did these defendants not obtain? What fees didn't they pay? Why is it unlawful for them to remove this from the custody of the customs? The Indictment does not tell us, and we are here at the threshold of a trial and we don't know what the issue is in this case. Is the issue whether or not they paid the duty? Is the issue whether or not they didn't obtain some permit that is required in an obscure section of the Code of Federal Regulations? We don't know" (18a).

supra, by reading the term "unlawfully," as used in section 549, as meaning "'with wrongful intent' rather than 'contrary to the express provisions of some other statute'" (314a). Apart from the fact that such a construction might well render the statute unconstitutionally vague (*cf. Screws v. United States*, 325 U.S. 91), it was entirely inconsistent with the Court's submission to the jury of the question whether the defendants violated separate and distinct statutes and customs regulations which were not charged in the indictment.

Here is presented a question of general application affecting all prosecutions under statutes which penalize "unlawful" acts without defining wherein the acts are "unlawful." The circuits are in conflict. It calls for resolution by this Court of the question whether indictments which allege only that a defendant acted "unlawfully" meet the Sixth Amendment requirement that a defendant be informed of the "nature and cause of the accusation."

III.

THE TRIAL JUDGE RULED AS A MATTER OF LAW THAT THE OPEN AREA IN THE DETROIT HARBOR TERMINAL, FROM WHICH THE PROPERTY WAS REMOVED, WAS A BONDED WAREHOUSE, AND THUS REMOVED A FACTUAL ELEMENT OF THE OFFENSE CHARGED FROM THE JURY'S CONSIDERATION.

One of the essential elements of the offense charged was that the removal of the merchandise was from a bonded warehouse. The trial court charged the jury that Area B was a bonded warehouse (206a, 221a).

Of this instruction the Court below held:

> "In our opinion what constituted a bonded warehouse was a question of law and it was the duty of

> the trial judge, *in the absence of conflicting testimony on the* subject, to instruct the jury as a matter of law that Area B met the requirements for a Class 4 Bonded Warehouse." (Emphasis added) (App. A, *infra*, p. 27)

This is in conflict with the holding of the Third Circuit in *United States v. Gollin* (1948), 166 F.(2) 123, which condemned a similar instruction, under another statute 18 U.S.C. §409. There, the conviction was reversed even though the testimony on the interstate status of the stolen property was "uncontradicted," and there was no "indication of the defense affirmatively contesting the testimony."[1]

The question has arisen in the Fifth Circuit, *Brooks v. United States* (1957), 240 F(2) 905, where a similar instruction resulted in reversal of conviction. The decision below also conflicts with those of the Seventh and District of Columbia Circuits. *United States v. Raub* (1949), 177 F(2) 312 (7 Cir.) and *Sullivan v. United States* (1949), 178 F(2) 723 (D.C. Cir.)

The ruling below is not unique in the Sixth Circuit. See *Malone v. United States* (1956), 238 F(2) 851. Therefore, petitioners are not asking this Court merely to review an erroneous but isolated decision of the Sixth Circuit, but they are asking that this Court resolve a difference of position between circuits on a matter important to the administration of justice and affecting the basic constitutional right to a jury trial.

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[1] This case is more aggravated. Petitioners affirmatively contested whether an open area not an inclosure could legally be made a bonded warehouse, citing to the trial judge, *In Re Miller Land Co.*, 56 F. Supp. 34, 37 (159a-161a), D.C. Mont., and requested instructions to the jury that would have left the status of Area B as a question of fact for their determination (249a, 251a).

For exposition of the need for Supreme Court guidelines in this area, see the dissenting opinion of Judge Hamley in *Brown v. United States* (1964) 334 F(2) 488, 501, 9th Cir., affirmed on other grounds, *sub nom. United States v. Brown*, 381 U.S. 437, which notes the lack of Supreme Court authority and extensively reviews the conflicting Federal decisions.

IV.

PETITIONERS' FIFTH AMENDMENT RIGHT AGAINST SELF INCRIMINATION WERE VIOLATED BY THE PROSECUTOR'S ARGUMENT BASED ON PETITIONERS' FAILURE TO CONTRADICT GOVERNMENT TESTIMONY.

This case presents the question whether prosecutors may circumvent the prohibition against directly commenting on a defendant's privilege to remain silent, by arguing to a jury that evidence stood uncontradicted, when a defendant was the only person who could offer contradiction.

The petitioner O'Brien did not testify. In its case in chief the prosecution, on direct examination of its witness Young, proved that he had not talked to O'Brien about the matter since O'Brien's arrest. This fact was immaterial and appears to have been designedly asked so as to lay a basis for the following argument in the government's rebuttal summation:

> "Is it believable to you that the defendant O'Brien is not going to talk to Mr. Young over this entire, eighteen months period, or whatever it is, getting on close to two years now, between the time of this occurrence and the time of this trial, and let, Mr. Young testifies, 'No O'Brien never has talked to me since about this subject.' And there is no contradiction of that at all in this record." (211a)

Petitioner O'Brien's counsel moved for a mistrial on the basis of the foregoing statement, pointing out that it was plainly a comment on O'Brien's failure to take the stand, since only he was in a position to contradict Young's testimony that he had not talked to Young about the subject (213a). The District Court, however, denied the motion, holding that the prosecutor's statement was "a fair comment on the evidence," but stating that he would consider the matter further following his charge to the jury (366a). The Court thereafter denied Petitioner's motion for a new trial on the basis of the statement (261a, 283a-288a).

The Sixth Circuit agreed with the trial court that the argument of the prosecution was not prejudicial;[6] and that the trial court's general instructions cured any possible error[7] (App. A, *infra*, pp. 30-33).

Such phrases as "The evidence is uncontradicted," or "Defendant has offered no evidence on the subject" have usually been held not to be a comment on defendant's failure to testify. But a different situation exists when contradiction can come *only* from the lips of the defendant.

In such a setting, argument that the evidence is uncontradicted is a prejudicial comment on the defendants' failure to testify according to the First Circuit in *Desmond v. United States* (1965), 345 F(2) 225. To like effect, see *Barnes v. United States* (1925) 8 F(2) 832 (8 Cir.). Cf.

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[6] Both the Trial Court and the Court of Appeals felt that the jury would draw no inference unfavorable to the petitioner O'Brien from the Prosecutor's argument because the Prosecutor hypothesized O'Brien having and having not talked to Young. However, the inevitable inference from the argument was that O'Brien could not truthfully confirm the statement he made at the time of his arrest.

[7] The holding that the general instructions "corrected any possible error" ignores this Court's decision in *Stewart v. United States*, 366 U.S. 1, 10, and conflicts with *Desmond v. United States* (1965), 345 F(2) 225 (1 Cir.).

Leathers v. United States (1957), 250 F(2) 159 (9 Cir.). The Court below adopts a contrary view.

This Court has not yet spoken on what peripheral arguments on a defendant's failure to testify by a prosecutor amount to prejudicial comment. In view of the conflict, only this Court can delineate when such arguments are violative of the Fifth Amendment.

Definitive decision in this area is made even more imperative because *Malloy v. Hogan*, 378 U.S. 1, and *Griffin v. California*, 380 U.S. 609 now require the States to apply federal standards in disposing of Fifth Amendment problems. The States are entitled to some definitions so that their Courts may function knowingly under what, to some, are entirely new rules.

V.

AN ESSENTIAL INGREDIENT OF THE OFFENSE HERE CHARGED IS THE KNOWLEDGE THAT THE MERCHANDISE INVOLVED WAS IN A BONDED WAREHOUSE OR OTHERWISE IN CUSTOMS CUSTODY OR CONTROL.

A novel question, not previously determined by this Court, is here presented, involving the nature and scope of the crime of unlawfully removing goods from Customs custody, 18 U.S.C. §549.

There was nothing about Area B, in which the property here involved was kept, to identify it as a bonded area. There were no Customs tags on the merchandise.[3] The prosecutor indeed conceded that there was nothing "to indicate to a stranger that these goods were in the custody

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[3] It was only after the merchandise was returned from Parial's warehouse that "general order" tags were placed on the merchandise (42a, 167a).

of the Customs at the date they were allegedly removed" (173a). The prosecutor, in fact, argued in his summation to the jury that it was immaterial that the defendants might not have known that the property was in Customs custody and control, and that the only question was whether the defendants were "thieves" and had "larcenous intent" (365a).

The District Court refused to charge, as requested by petitioners (248a, 254a), that before convicting either defendant, it was essential for the jury to find that such defendant knew that the merchandise involved was in a bonded warehouse or otherwise in Customs custody; and an exception was duly taken to the refusal of that request (234a, 235a).

Criminal statutes to protect the revenue require a showing of knowledge of the tax obligation because an intent to evade it is essential to a conviction. *Hargrove v. United States* (1933), 67 F(2) 820 (5 Cir.).

> "Without the knowledge the intent cannot exist." *Ingram v. United States*, 360 U.S. 672, 678.

A similar showing of knowledge (to prove intent) is required in prosecutions under criminal statutes to protect the currency. *United States v. Carll*, 105 U.S. 611. Knowledge must also be proven in smuggling prosecutions "to protect against [prosecution of] an innocent movement of merchandise across the border, without knowledge on the part of the person charged." *Wishart v. United States* (1928), 29 F(2) 103, 105 (8 Cir.).

Parity of reasoning requires a like rule under §549. The purpose of the section was to protect the United States against being defrauded of Customs duties or clearances to

which it is entitled, through the wilful, knowing and unlawful removal of property in Customs custody. The statute is thus applicable even to one who knowingly and wilfully removes his own property from Customs custody without obtaining the requisite Customs release. See *Hughes v. United States, supra,* 338 F(2) at 652. The District Court itself submitted the case to the jury on the theory that the gravamen of the crime charged was the removal of property in Customs custody for which no release had been obtained from the Customs authorities.

The Court of Appeals below disposed of this question on the ground that knowledge was not an essential element of the crime here involved, and that the case was one analogous to "offenses *mala prohibita,*" in which "the statute simply denounces the doing of an act as criminal" and "the law imputes the intent." (See App. A, *infra,* p. 27, 28). Its decision for the reasons stated is substantially in conflict with the decisions of *Carll* in this Court, *Hargrove* in the 5th Circuit and *Wishart* in the 8th Circuit.

CONCLUSION

For all of the reasons advanced, the petition should be granted.

Respectfully submitted,

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APPENDIX A

Nos. 16,809 and 16,810

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
THOMAS PARISI and
CHARLES JOSEPH O'BRIEN,
Defendants-Appellants.

ON APPEAL from the United States District Court for the Eastern District of Michigan Southern Division.

Decided August 30, 1966.

Before: PHILLIPS and CELEBREZZE, Circuit Judges, and CECIL, Senior Circuit Judge.

CECIL, Senior Circuit Judge. These cases are on appeal by Thomas Parisi and Charles Joseph O'Brien, defendants-appellants, from a judgment of conviction in the United States District Court for the Eastern District of Michigan, Southern Division. These appellants, whom we will call defendants, along with one Sam Salvatore Finazzo, were jointly indicted on a three-count indictment charging them with unlawfully removing certain merhcandise from a bonded area at the Detroit Harbor Terminal and from the custody and control of the United States Customs Service, in violation of Section 549, Title 18, U.S.C.[1]

[1] "Whoever maliciously enters any bonded warehouse or any vessel or vehicle laden with or containing bonded merchandise with intent unlawfully to remove therefrom any merchandise or baggage therein, *or unlawfully removes any merchandise or baggage in such vessel, vehicle, or bonded warehouse or otherwise in customs custody or control;*" * * * (Emphasis added.)

The first count charged that they removed fourteen cases containing marble slabs and table tops, with identifying markings, on or about March 19, 1963. The second count charged the removal of a marble statue of St. Theresa on or about March 18, 1963. The third count charged that they removed twenty-one cases containing brass valves and fittings and chrome valve handles on or about March 18, 1963. Each count,[1] except as to the date and description of merchandise removed, is identical in terms of the offense charged.

The trial judge sustained a motion for a judgment of acquittal, on behalf of Finazzo, at the close of the government's testimony. The defendant Parisi was found guilty on the second and third counts and the defendant O'Brien was found guilty on all three counts of the indictment. Parisi was sentenced to imprisonment for eighteen months and O'Brien for one year and one day.

The merchandise involved in the indictment had been a part of the cargo of the SS Montrose which sank in the Detroit river on July 30, 1962. Some of this merchandise was salvaged in September 1962, while the ship was still submerged. The remainder of the cargo was removed from the ship in November 1962, after it was refloated. All of this salvaged cargo was taken to the Detroit Harbor Terminal. The merchandise was placed under a General Order by the Collector of Customs upon its discharge from the ship. (Physical possession taken by Collector of Customs who holds it until final disposition is made.)

The insurance company advertised the merchandise for sale and a Mr. Mularoni, who was the highest bidder, pur-

[1] "Count Two: The Grany Jury further charges: That on or about March 18, 1963 in the Eastern District of Michigan, Southern Division, Sam Salvatore Finazzo, Thomas Parisi and Charles Joseph O'Brien, defendants herein, did unlawfully remove certain merchandise from a bonded area at the Detroit Harbor Terminal, 4461 West Jefferson, Detroit, Michigan, and from the custody and control of the United States Customs Service, namely a marble statue of St. Theresa, which had been in Customs custody since being removed from the SS Montrose on or about July 29, 1962; in violation of Section 549 Title 18, USC."

chased some of the items which are the subject of the three counts of the indictment. A few days later Mr. Mularoni received a telephone call from Arrow Salvage Company. As a result of this call he went to the office of Arrow Salvage Company and, upon being shown some merchandise, identified it as the merchandise he had bought the week before. Mr. Mularoni notified the customs officers and the next day he went back to Arrow Salvage Company in company with customs officers. They met the defendant Thomas Parisi who showed them the merchandise and who claimed that it was his. Part of it was identified as merchandise previously purchased by Mularoni. Other items were identified as part of the cargo of the Montrose and which had been in storage at Detroit Harbor Terminal. Later, the defendants O'Brien and Salvatore Finazzo came in. After some questioning all three men were arrested and were subsequently charged in the indictment now before the Court.

Among the various assignments of error both defendants claim that the indictment does not state an offense. Since each count of the indictment is subject to the same objection made by defendants, we will refer to them as the indictment. The charge that the indictment is fatally defective and does not state an offense is based on two grounds. 1. It does not allege that the defendants acted knowingly or wilfully or with felonious intent; and 2. It does not set out with requisite specificity the offense, under the general statutory description, with which the defendants are charged.

In support of the first claim of deficiency, the defendants cite *Hughes v. United States,* 338 F.2d 651, 340 F.2d 609, C.A. 1. This case is analogous to the case at bar but the district judge did not follow it and neither do we. In *United States v. Deutch,* 235 F.2d 853, 854, C.A. D.C., the court held an indictment sufficient which charged that the defendant "'unlawfully refused to answer' five specific questions put to him by a Committee of Congress." This was a prosecution under Section 192, Title 2, U.S.C. This statute contained two offenses:

"* * * wilfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, * * *"

The court said:

> "Any doubt on this is resolved by the presence of the word 'unlawfully' preceding 'refused' in this indictment; that would satisfy the statute since a refusal would be unlawful only if it were wilfull. In other words, if 'refused' standing alone were held not sufficient because it does not connote a refusal which violates the statute, the presence of the word 'unlawfully' would remedy that defect."

So in the case before us, "unlawfully remove" has the same effect as "unlawfully refused to answer." To the same effect is *Logsdon v. United States*, 253 F.2d 12, 13-14, C.A. 6; *Madsen v. United States*, 165 F.2d 507, C.A. 10; *United States v. Williams*, 202 F.2d 712, 713, rehearing den. 203 F.2d 572, C.A. 5, cert. den. 346 U.S. 822; *United States v. Amorosa*, 167 F.2d 596, 597, C.A. 3; *United States v. Silver*, 235 F.2d 375, C.A. 2, cert. den. 352 U.S. 880.

In *Madsen v United States, supra*, the court said, at p. 509:

> "The sufficiency of an indictment is no longer tested by the rigors of the old technical rules of criminal procedure. The test is whether the indictment contains the elements of the offense intended to be charged and sufficiently informs the defendant of what he must meet in the preparation of his defense, and whether it is sufficiently specific to obviate the danger of the defendant being prosecuted a second time for the same offense. The indictment must allege the essential elements of the offense but mere forms of averment may be disregarded. Tested by these rules, we find no difficulty in upholding the sufficiency of the indictment."

In *Hartwell v. United States*, 107 F.2d 359, C.A. 5, the court said, at p. 362:

> "While it is certainly true that a valid indictment cannot be dispensed with as a predicate to conviction where an indictment is necessary, (Citation omitted) it is also true that the practice of fine combing indictments for verbal and technical omissions is no longer countenanced in the courts, and that a substantial compliance with the purpose of an indictment to acquaint the defendant with the offense of which he stands charged so that he can prepare his defense and protect himself against double jeopardy, is sufficient. The indictment complained of complies fully with the rule."

In *Duke v. United States*, 233 F.2d 897, C.A. 5, the court said, at p. 899:

> "The sufficiency of an indictment must be determined on the basis of practical rather than technical considerations, • • •"

See also *Risken v. United States*, 197 F2d 959, 962, C.A. 8; 4 Anderson's Wharton's Criminal Law and Procedure, Section 1749, p. 538; *United States v. Debrow*, 346 U.S. 374, 376.

The claim that the indictment does not describe the offense with specificity is without merit. Each count of the indictment describes exactly what merchandise was removed, the date that it was alleged to have been removed and that it was in violation of Section 549, Title 18, U.S.C. This section defines the offense without reference to any other statute. The defendants would have no difficulty in knowing with what crime they were charged. Neither would there be any danger of the defendants being prosecuted a second time for the same offense.

The district judge gave a scholarly opinion on the subject of the sufficiency of the indictment and we are in agreement with it. — Fed. Supp. —. We conclude that the indictment is valid and that it is "a plain, concise and defi-

nite written statement of the essential facts constituting the offense charged," as required by Rule 7(c) of the F.R. Cr.P.

One assignment of error on behalf of the defendant O'Brien is that the evidence is insufficient to sustain a conviction. The rule for an appellate court in determining the sufficiency of the evidence is stated in *Ross v. United States*, 197 F.2d 660, 665, C.A. 6, as quoted with approval from *United States v. Manton*, 107 F.2d 834, 839, C.A. 2, cert. den. 309 U.S. 664:

> "In passing upon the sufficiency of the proof, it is not our province to weigh the evidence or to determine the credibility of witnesses. We must take that view of the evidence most favorable to the government and sustain the verdict of the jury if there be substantial evidence to support it."

We have read all of the evidence submitted to us in the appendices and considering it in the most favorable light to the government, it is such that, if believed, the jury could draw reasonable inferences to support a guilty finding against the defendant O'Brien. One cannot read the evidence without concluding that O'Brien was the one who was instrumental in having the merchandise removed. The question then was one of intent and that was a matter for the jury to determine under all of the facts and circumstances of the case. We agree with the trial judge that there was sufficient evidence to support the conviction of O'Brien.

One of the assignments of error urged on behalf of the defendant Parisi is that the trial court erred in not granting his motion for acquittal. The record shows that no motion for acquittal was made for defendant Parisi after verdict in accordance with Rule 29(c) F.R.Cr.P. Such motions were made during the progress of the trial. These motions raise a question as to the sufficiency of the evidence. We are of the opinion that there was ample evidence to support the conviction of the defendant Parisi.

Both defendants assign as error that the trial judge erred in instructing the jury as a matter of law that Area B was within the limits of a bonded warehouse. In our opinion what consituted a bonded warehouse was a question of law and it was the duty of the trial judge, in the absence of conflicting testimony on the subject, to instruct the jury as a matter of law that Area B met the requirements for a Class 4 Bonded Warehouse. This required the trial judge to interpret several statutes and regulations. We agree with the interpretation and analysis of the statutes and regulations as made by the trial judge in his opinion denying the motions for a new trial, as reported at — Fed. Supp. —, and conclude that there was no error in this respect.

Another claim made on behalf of defendant O'Brien is that the trial judge erred in charging the jury in such a manner that the jury could find that the defendant O'Brien had possession of the property involved, and that it could draw inferences against him of guilty knowledge and participation in the unlawful removal of the property. In support of this claim, a paragraph of the instruction, taken out of context, is quoted in the brief. Reading the entire instruction on this subject we conclude that the jury could not possibly find that the instruction with reference to inferences to be drawn from recently removed property could apply to the defendant O'Brien. We find no error in this respect.

Both defendants claim that the court erred in not charging the jury that in order to convict it was necessary for the jury to find that the defendants knew that the merchandise was in a bonded warehouse. This request was refused by the court for the reason that the statute does not make knowledge that the area, from which the merchandise was taken, was bonded an element of the offense.

No cases are cited to the effect that knowledge that the warehouse was a bonded warehouse is an essential element of the crime. *Hargrove v. United States*, 67 F.2d 820, C.A. 5, cited by counsel, in our opinion is not applicable. The question here is whether the trial court erred in not charg-

ing the jury that "a specific wrongful intent, that is, actual knowledge of the existence of obligation and a wrongful intent to evade it, is of the essence." The court said, at p. 823:

> "The court here fell into the error of not distinguishing between the elements of an offense, where the statute simply denounces the doing of an act as criminal, and where it denounces as criminal only its wilful doing. In the first class of cases, especially in those offenses mala prohibita, the law imputes the intent. (Citations omitted.) Had the prosecution here been under such a statute, the charge of the court would have been unexceptionable. In the second class of cases, a specific wrongful intent, that is actual knowledge of the existence of obligation and a wrongful intent to evade it, is of the essence."

To the same effect is *Babb v. United States,* 252 F.2d 702, 708, C.A. 5, cert den. 356 U.S. 974, also cited by counsel for defendant. In our opinion the case before us is in the first class of cases described in *Hargrove, supra.* In *Hughes v. United States, supra,* the court held that a felonious intent was a necessary element of the crime but it did not hold that a felonious intent to remove property from a bonded warehouse had to be coupled with a *knowledge* that the warehouse was bonded. We find no error on the part of the trial judge in rejecting the proffered charge.

Both defendants assign as error the failure of the trial judge to grant a new trial, for the reason that one of the jurors, Francis L. Tickner, failed to disclose that he had been an employee of government witness William P. Young, the president of the Detroit Harbor Terminal. There is attached, as an exhibit, to the motion of the defendant O'Brien for a new trial an affidavit of the witness William P. Young.

According to this affidavit, Young is the sole owner of a Michigan corporation known as Better Brands Distributing Company. Approximately fifteen years prior to January 1965, this corporation was operated at 4461 West Jeffer-

son Street in Detroit, Michigan, the premises of Detroit Harbor Terminal. Juror Francis L. Tickner had been employed by Better Brands Distributing Company about fifteen years prior to the time of the trial. He was so employed for a little more than a year and worked under the supervision of Mr. Young. It was further stated in the affidavit that on one afternoon during the progress of the trial, the juror recognized Mr. Young and told him that he had retired as a brewery truck driver.

All of the questions of the court directed to the prospective jurors in voir dire related to connections with Detroit Harbor Terminal. The juror never worked for Detroit Harbor Terminal and had no dealings or connection with it, so far as is shown by the record before us. One of the prospective jurors, a Mr. Buick, responded that he had had a brief contact with Mr. Young whom he believed was vice president of Detroit Harbor Terminal. This is the only reference to Mr. Young in the voir dire. From this, counsel for the defendant argues that the juror should have volunteered that he too had known Mr. Young. We do not think that this logically follows and that the juror can be charged with withholding information. Juror Tickner was not a party to the colloquy between the court and Mr. Buick and he may not have been alert to the significance of it. Furthermore, he might well have not realized that the Young who is now president of Detroit Harbor Terminal was the Young for whom he worked at Better Brands fifteen years before. Indeed, he may have had no recognition of Mr. Young until he saw him on the witness stand. Under these circumstances we think the juror was not called upon to make a spontaneous response.

It is argued by counsel for the government that the defendants were made aware of this matter while the trial was in progress and that they did not make timely objection to it. This assumes that counsel became aware of it at the time Mr. Young testified. This is not necessarily true and we do not find anything in the record to show when counsel first learned of the acquaintance. If it is true that counsel learned of it when Mr. Young testified, then the

government's point is well taken. *Frazier v. United States*, 335 U.S. 497, 512; *Spivey v. United States*, 109 F.2d 181, 186, C.A. 5, cert. den. 310 U.S. 631.

Finally, it is claimed that the court erred in not granting a new trial to O'Brien for the reason that government counsel made prejudicial comment on his failure to testify. The basis of this claim is the statement of government counsel "And there is no contradiction of that at all in this record," taken out of context[3] from counsel's rebuttal argument.

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[3] "Now, ladies and gentlemen of the jury, is it believable to you that the defendant O'Brien, having told the agents earlier on March 21st it was, 'Look, I had this conversation with Young and he gave me authority or something, permission to remove this, and it was pursuant to that that I allowed these men to remove this merchandise,' this occurring in March 21st, 1963, and then, having talked not to Young but having gotten Drijver on the phone—no showing that he talked to Young on that day; is it believable to you that Mr. O'Brien is going to sit around for a year and a half, up to the very day of this trial, and in fact, up to the date of Mr. Young taking the stand and not go to Mr. Young and not ask Mr. Young?

"'Look, Mr. Young, I am in trouble here, Didn't you tell me several months before this merchandise was released that you had given me permission to negotiate for the scrap removal?'"

"Is it believable to you that the defendant O'Brien is not going to talk to Mr. Young over this entire eight-months period, or whatever it is, getting on close to two years now, between the time of this occurrence and the time of this trial, and yet, Mr. Young testifies 'No, O'Brien never has talked to me since about this subject.' And there is no contradiction of that at all in this record.

"Now, I suggest to you that there are only two inferences to be drawn from that: The first is that O'Brien didn't talk to Young because it was futile to do so. He knew that there had never been any such conversation and he wasn't going to raise the subject with Young, and get a no response, which isn't going to help him.

"So that O'Brien doesn't do it for that reason.

"And the second explanation is simply this, that possibly he did talk to Young in this 18 or 20 month period since the time of this occurrence and Mr. Young gets on the stand and says that he had not talked to O'Brien because he is trying to cover up for O'Brien; If there is to be any inference at all about the testimony of Mr. Young and Mr. Drijver, the inference is that they are very anxious to cover up for Mr. O'Brien, but they don't want to go to the extent of committing perjury to do so. They are willing to say possibly, that 'I don't recall this or that,' but they are not willing to come out and say, 'Yes, I authorized the removal; we had negotiations about the scrap removal and the like,' and that to me is the inference that this testimony lends itself to."

A motion for mistrial was made on behalf of the defendant O'Brien. Authorities[4] were cited which tend to hold that a statement to the effect that there is no contradiction in the record when only the defendant, who did not take the witness stand, could make the contradiction, amounts to prejudicial comment on the failure of the witness to testify.

Taken in the entire context of the argument of counsel, we do not think the statement constitutes comment on the failure of the defendant O'Brien to take the witness stand and to testify in his own behalf. We are of the opinion that the district judge gave an adequate and correct summary of the incident in his opinion denying the motion for new trial. He said:

> "However, it would seem that in the instant case Mr. Komives' comment that Young's testimony was uncontradicted would constitute an improper comment on O'Brien's failure to take the stand only if the jury would be likely to conclude from the statement in the context of the argument that O'Briens' failure to contradict the testimony reflected adversely on O'Brien in some manner."
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> • • • • •
>
> "It is clear from an examination of the context of Mr. Komives' allegedly prejudicial comment that he was not attempting to suggest to the jury any improper inference concerning O'Brien's failure to take the stand. He continued his argument by stating there were only two inferences to be drawn from the uncontradicted statement of Young that O'Brien had never talked to him since—either that Young was telling the truth or that he was lying. Mr. Komives' argument to the jury was in substance that in either event it was damning to O'Brien. If Young were telling the truth, argued Mr. Komives, then O'Brien would know better than to talk to him later and try to

[4] *Linden v. United States*, 298 F. 104, C.A. 5; *Barnes v. United States*, 8 F.2d 832, C.A. 8; *Langford v. United States*, 178 F.2d 48, CA 9, cert. den. 339 U.S. 938; *Leathers v. United States*, 250 F.2d 159.

fabricate an alibi. But if Young were lying, O'Brien must have talked to him in an attempt to establish an alibi, and therefore Young was covering up for O'Brien.

"Thus, Mr. Komives, it appears to this Court, was clearly not arguing that Young must have been telling the truth because O'Brien did not take the stand to contradict him. On the contrary, the argument called Mr. Young's credibility into question, in spite of the fact that his statement was uncontradicted. The remark that Young's statement was uncontradicted was part of an argument based on opposing interpretations of Mr. Young's credibility, and when the remark is seen in this context, it is highly unlikely that the jury drew from the remark any unfavorable inference concerning O'Brien's failure to take the stand. Indeed, the jury hardly had time even to reflect that O'Brien was the only person who could have contradicted Young's statement. Further, this Court does not consider that the statement of Mr. Komives was specifically planned as a comment on the silence of the defendant O'Brien."

• • • • •

"In the opinion of this Court, the remark of Mr. Komives that Young's statement was uncontradicted was not specifically planned to prejudice O'Brien, nor did it cause the jury to look unfavorably upon O'Brien's failure to take the stand. Therefore, O'Brien, in the opinion of this Court, was not prejudiced by the remark and the remark was not improper.

"But even assuming hypothetically that the remark was prejudicial, defense counsel argued and the Court specifically instructed the jury that O'Brien had a constitutional right not to take the stand, and that no inference should be drawn from his failure to do so.

"In the opinion of this Court, such instructions corrected any possible error. Therefore, a new trial is not 'required in the interest of justice' on this ground under Rule 33."

In support of his ruling the court cited 22 C.J.S., Sec. 1098, p. 172; 8 Wigmore, Evidence, Sec. 2272, p. 436; *People v. Earl*, 299 Mich. 579. See *Langford v. United States*, 178 F.2d 48, C.A., 9, cert. den. 339 US. 938, where the court said at p. 55:

> "We believe that the remarks of the prosecutor, when considered as the jury must have viewed and understood them in the light of what transpired at the time, were not prejudicial. We have come to this conclusion, not for the reason urged by the government, but for the reason that we do not think that the remarks of counsel were made in such manner as would be likely to lead the jury to draw improper inferences."

We are asked, on behalf of the defendant Parisi, to find as plain error under Rule 52(b) F.R.Cr.P. the giving of a charge which was given in the language requested by counsel representing the defendant at the trial. The charge reads as follows: "I charge you that the defendant Parisi must have taken part in this transaction with an unlawful intent—in other words, a consciousness of guilt—" The court added to that "and that would apply, of course, to both defendants." This part of the charge followed a statement to the effect that if the jury found that either defendant reasonably believed the property to be abandoned property, the jury should acquit such defendant.

It is claimed that the objectionable instruction virtually directed the jury to return a verdict against the defendant Parisi. While the charge was framed in a poor choice of language, it is obvious what counsel meant at the time it was submitted. It is really in the subjunctive and not a statement of a fact. What it says, very poorly, is that Parisi must have had an unlawful intent before he could be found guilty. We think counsel, the Court and the jury understood it. We find no merit to this assignment of error.

The district judge concluded that the three counts of the indictment constituted but one offense and he gave each of the defendants only one sentence. We find no error in this respect .

The judgment of the District Court is affirmed as to both defendants.

APPENDIX B

JUDGMENT

(Cause No. 16,810)

(Filed August 30, 1966)

Before: PHILLIPS and CELEBREZZE, Circuit Judges, and CECIL, Senior Circuit Judge.

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

JUDGMENT

(Cause No. 16,809)

(Filed August 30, 1966)

Before: PHILLIPS and CELEBREZZE, Circuit Judges, and CECIL, Senior Circuit Judge.

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs awarded. Rule 23(4).

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk

APPENDIX C

ORDER

(Causes Nos. 16809 and 16810)

(Filed October 6, 1966)

Before: PHILLIPS and CELEBREZZE, Circuit Judges, and CECIL, Senior Circuit Judge.

Upon consideration of the petition for rehearing herein, it is hereby denied.

Entered by order of the Court.

/s/ Carl W. Reuss
Clerk.